No. 11,080

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN E. GALLOIS, Executor, and JEANNE G. HILL, Executrix, of the Estate of Margaret P. Gallois, Deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review a Decision of the Tax Court of the United States.

PETITIONERS' OPENING BRIEF.

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JURISDICTION OF THE COURT.

This is a petition to review a decision of the Tax Court of the United States. Petitioners on review are John E. Gallois, executor, and Jeanne G. Hill, executrix, of the estate of Margaret P. Gallois, deceased. The petitioners filed a federal estate tax return with the Collector of Internal Revenue of the First District of California, located in the City of San Francisco, State of California, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law

after the date of the death of Margaret P. Gallois on August 8, 1940. The respondent on review is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, hereinafter referred to as the Commissioner, holding his office by virtue of the laws of the United States.

The case arose because the Commissioner claimed a deficiency of estate tax against the estate of Margaret P. Gallois in the amount of $19,323.36. The case regularly came up for hearing before the Tax Court of the United States in San Francisco, California, on September 22, 1944. Upon the 27th day of February, 1945, the said Tax Court of the United States made its findings of fact and opinion and rendered its decision in favor of the respondent for the full amount of the alleged deficiencies. On the 24th day of May, 1945, and within the time allowed by law therefor, petitioners filed their petition for review by the United States Circuit Court of Appeals, Ninth Circuit, with its assignment of errors.

This Court has jurisdiction upon appeal to review the decision of the Tax Court of the United States in question by virtue of the provisions of paragraphs (a) and (b) of Section 1141 of the Internal Revenue Code.

STATEMENT OF THE CASE.

Margaret P. Gallois, hereinafter called the decedent, was born March 17, 1856, and died testate on August 8, 1940, a resident of the City and County of San

Francisco, California. The petitioners, John E. Gallois and Jeanne G. Hill, are the duly qualified and acting executor and executrix, respectively, of her last will and testament. The estate tax return was filed with the Collector of Internal Revenue for the First District of California. (T. R. 90.)

Prior to August, 1924, the decedent had loaned to her son, John E. Gallois, the sum of $251,000 with no evidence of the indebtedness being executed in writing. In order to make this loan she had heavily encumbered her own property. Because she had advanced to her son such a large part of his portion of the estate, the decedent desired to protect the interest of her other child, Jeanne G. Hill. Therefore, on August 9, 1924, she executed a trust, naming herself, Emile M. Pissis and William H. Cook as trustees. (T. R. 90.)

The trustees were directed to apply the income of the trust, (a) to the payment of interest due or to become due on the obligations of the decedent, secured by liens on the trust property; (b) to the payment of taxes, assessments, insurance, repairs, etc.; and (c) after payment of the above charges, to pay the remainder of the net income to the decedent. (T. R. 90.)

Other material provisions of the trust are as follows:

Second. The trustees are likewise authorized and directed to apply to the maintenance and support of said Margaret P. Gallois any portion of the principal of said trust fund which may at any time be in their opinion necessary for her maintenance and sup-

port by reason of or in the event of any deficiency in the income of said trust fund. (T. R. 91.)

Third. Upon the death of said Margaret P. Gallois the said trust and the powers and duties of the surviving trustees shall continue during the life of Jeanne G. Hill, and during her life the net income from said property, as hereinbefore defined, shall be paid by said surviving trustees to said Jeanne G. Hill. (T. R. 91.)

Fifth. Upon the death of said Jeanne G. Hill the said trust shall cease and determine and all of said trust property then remaining in the hands of said surviving trustees shall go to and vest absolutely in equal shares in the children of said Jeanne G. Hill. If, at the time of the death of said Jeanne G. Hill, any of her children shall have died leaving issue, such issue shall receive the share of said trust property to which such deceased child would have been entitled if living. If all of the children of said Jeanne G. Hill should predecease her, then upon her death said trust fund and the whole thereof shall go to and vest in John Gallois, if living, and if he be then dead, then it shall vest in the next of kin of said Jeanne G. Hill, in accordance with the succession laws of the State of California then in effect. In the event of the death of said Jeanne G. Hill prior to the death of said Margaret P. Gallois, said trust shall cease and determine upon the death of said Margaret P. Gallois, and said trust fund and the whole thereof shall go to and vest in the children of Jeanne G. Hill and their issue, as hereinbefore provided. If said Jeanne G. Hill and all her

children die without issue prior to the death of said Margaret P. Gallois, then this trust shall terminate and the trust funds shall vest in said Margaret P. Gallois. (T. R. 92.)

Ninth. Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John Gallois the sum of $251,000, or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring to Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy between the moneys received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois. (T. R. 92.)

Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by John Gallois or on his account sums of money sufficient so that the said Margaret P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her death, then fifty per cent (50%) of the excess of the value of said property over and above the amount of such outlays remaining unpaid shall go to and vest in said John Gallois and the balance of said property shall vest as hereinbefore provided. If, at the time of the death of said Margaret P. Gallois, the amount of such unpaid outlays made by her on behalf of John Gallois still exceeds the then value of

the trust fund in the hands of said trustees, exclusive of any claim against John Gallois, the whole of said fund shall go to and vest in the children of Jeanne G. Hill, after her death as hereinbefore provided, but said John Gallois shall not at any time be deemed indebted to said trustee or to the estate of Margaret P. Gallois, nor shall any attempt be made by the trustees or any successors of Margaret P. Gallois to collect any part of said outlays from said John Gallois, and if the same shall at the death of Margaret P. Gallois apparently exist as an indebtedness, such indebtedness shall be deemed forgiven and cancelled, together with any instruments, documents or writings of any kind constituting evidence of any such indebtedness, so that the same cannot go to or vest in any successor of Margaret P. Gallois under the terms of this instrument or otherwise. (T. R. 93.)

The decedent retained no power to alter, amend or revoke the trust. (T. R. 93.)

At the time the trust was created, the decedent was 68 years of age and in good health for a woman of that age. She had 2 children, John aged 38, and Jeanne aged 36, and 3 grandchildren of the ages of 7, 5 and 1, respectively, all being the children of Jeanne. She left surviving her at her death her 2 children, 3 grandchildren, and 3 great grandchildren, Harry Poett III, aged 1 year and 8 months, Carolan Poett, aged 5 months, and Louise Haley, aged 5 months. (T. R. 94.)

The decedent's son was unaware of the trust at the time of its creation and did not learn of its existence until about 2 years later. (T. R. 94.)

Decedent's daughter, Jeanne, was married to Horace Hill, Jr., who had been well off, but who, in the period from 1924 to 1928, was in very straitened circumstances. It was to protect her daughter from further loss that the decedent had created the trust. The trust had an indebtedness greater than the market value of the property in the trust and John was constantly being pressed by Hill and others to pay the amount he owed his mother. He was unable to make any payments on his indebtedness until 1927. Between December 19, 1927, and September 13, 1928, he made payments aggregating about $42,000. (T. R. 94.)

By October, 1928, John was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the decedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and John then executed his promissory note, dated October 30, 1928, in the sum of $251,000, to the trustees. (T. R. 94.)

Following this, and on November 7, 1928, two of the original trustees, Emile Pissis and William H. Cook, resigned, and John E. Gallois and Jeanne G. Hill were appointed trustees in their place. Following his appointment as trustee, John paid the balance of his indebtedness. (T. R. 95.)

By December, 1927, the statute of limitations had run on John Gallois' indebtedness to the decedent and he was under no legal obligation to pay any part thereof; furthermore, prior to the payments by him,

the trust properties had no value since they were encumbered to an extent in excess of their fair market value. (T. R. 96.)

The above facts are not in dispute, and the question involved is what, if any part, of the corpus of the trust created by Margaret P. Gallois, the decedent, on August 9, 1924, should be included in the decedent's gross estate under the provisions of Section 811 (c) and (i) of the Internal Revenue Code.

SPECIFICATION OF ERRORS.

The Tax Court of the United States erred in determining the taxable net estate of Margaret P. Gallois, by including the entire value of the trust corpus in the amount of $135,330.40 in the net estate for estate tax purposes and did not properly interpret Section 811 (c) and (i) of the Internal Revenue Code excepting from the gross estate the trust where there was a bona fide sale for an adequate and full consideration in money or money's worth. The Tax Court of the United States further erred in failing to give proper consideration to the agreement of the decedent that the corpus of the trust would not be invaded upon the repayment of the $251,000 by John E. Gallois, and by including any part of the trust corpus in the estate for estate tax purposes.

ARGUMENT.

I. PETITIONERS CONTEND THAT THE PAYMENT BY JOHN E. GALLOIS OF $251,000 TO THE DECEDENT, MARGARET P. GALLOIS, ON AN OBLIGATION BARRED BY THE STATUTE OF LIMITATIONS BROUGHT THE TRUST SQUARELY WITHIN THE EXCEPTIONS PROVIDED FOR IN SECTION 811 (c) AND (i) OF THE INTERNAL REVENUE CODE, SO THAT NO PART OF THE TRUST ESTATE WAS SUBJECT TO ESTATE TAX IN THE ESTATE OF MARGARET P. GALLOIS.

The Tax Court found that by December, 1927, the statute of limitations had run on John Gallois' indebtedness to the decedent, and he was under no legal obligation to pay any part thereof; furthermore, prior to the payment by him, the trust properties had no value since they were encumbered to an extent in excess of their fair market value. (T. R. 96.)

Petitioners contend that this brings the case squarely within the provisions of Section 811 (c) and (i) of the Internal Revenue Code which provides as follows:

> "(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or en-

joy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

(i) Transfers for Insufficient Consideration.—If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent."

The facts found by the Tax Court were as follows:

"The Trust had an indebtedness greater than the market value of the property in the trust and John was constantly being pressed by Hill and others to pay the amount he owed his mother. He was unable to make any payments on his indebtedness until 1927. Between December 19, 1927, and September 13, 1928, he made payments aggregating about $42,000. (T. R. 94.)

By October, 1928, John was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the de-

cedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and John then executed his promissory note, dated October 30, 1928, in the sum of $251,000, to the trustees. (T. R. 94.)

Following this, and on November 7, 1928, two of the original trustees, Emile Pissis and William H. Cook, resigned, and John E. Gallois and Jeanne G. Hill were appointed trustees in their place. Following his appointment as trustee, John paid the balance of his indebtedness." (T. R. 95.)

The uncontradicted evidence concerning the agreement was as follows:

"(Testimony of John Eugene Gallois.) (T. R. 36-37-38.)

Q. In October of 1928, were you then in a financial position to pay this obligation, the remainder of it.

A. All of it.

Q. And did you have any conversations then, on or about October, 1928, with Margaret P. Gallois concerning the repayment of this money and the trust?

A. I did.

Q. Will you tell approximately the time of the conversation?

A. Oh, probably the end of September and during October of 19—I believe it was '27 or '28, 1928.

Q. And your mother at that time lived where?

A. At the Fairmont Hotel.

Q. Were these conversations held in her room?

A. They were held in her room.

Q. Do you recall whether anyone else besides you and your mother were present at these conversations?

A. I generally was alone. I cannot recall of anybody—my sister might have been there once in awhile, I don't know. I can't—we quite often talked about these things during that period.

Q. Did you come to any definite understanding with your mother as to what you would do as to repaying this money, and what she would do if you repaid it? You can answer that yes or no.

A. Yes.

Q. All right. Now, will you state what that understanding was?

A. Well, I realized at that time that I was morally obligated to my mother, and that I was not (T. R. 36) legally obligated, and having gone through the vicissitudes of those past years and knowing how my mother had worried through those past years, and seeing my sister's financial condition becoming worse and worse, I felt that the shoe was on the other foot at that time, and that I wanted to protect my sister and protect myself. At that time that trust, before I made any repayments, had no financial backing.

Q. You mean by that that the indebtedness—

A. Was greater.

Q. —than the market value at that time?

A. Than the market value of the trust. So I realized that I could have made several arrangements with my mother which would have protected her, but I thought that inasmuch as that trust had been founded partly due to what she

> thought were my errors, that it would only be the fair thing to have this thing to go back into the trust, but if that took place, I wanted to have the control of that trust, so that we would never get in the condition that it was in again. In other words, we were to pay off the indebtedness of the trust and really make it something that was good and sound and that never could be touched. I said to mother, I said, 'Mother, I am perfectly willing to do this, although I realize that I don't have to do it, with the understanding that you name me as a Trustee, and also that we will never get into this mess again, and that we will never hit the principal (T. R. 37) (or the corpus, if you want to call it that), and so, to protect me, I must be a trustee.' To which she agreed." (T. R. 38.)

It is the taxpayer's contention that the agreement between John Gallois and Margaret P. Gallois, the decedent, became fully executed when John Gallois paid the balance of the $251,000, the last payment being $209,000, and his mother had John Gallois appointed trustee. The Ninth Clause of the trust instrument provided as follows:

> "Ninth. Whereas said Margaret P. Gallois heretofore laid out and expended for the account and benefit of John E. Gallois the sum of $251,000, or thereabouts, exclusive of interest, and this agreement is made in part for the purpose of insuring to Jeanne G. Hill and her children a benefit which may to some extent correct the discrepancy between the moneys received by said Jeanne G. Hill from said Margaret P. Gallois and the outlays of said Margaret P. Gallois on behalf of said John Gallois. (T. R. 92.)

Now, therefore, notwithstanding anything which may be hereinbefore contained, it is provided that at the time of the death of said Margaret P. Gallois, if there has been paid to her by John Gallois or on his account sums of money sufficient so that the said Margaret P. Gallois shall have been reimbursed to such extent that the amount unpaid is less than the value of the assets in the annexed schedule, exclusive of any claim against John Gallois, as appraised at the time of her death, then fifty (50%) per cent of the excess of the value of said property over and above the amount of such outlays remaining unpaid shall go to and vest in said John Gallois and the balance of said property shall vest as hereinbefore provided. If, at the time of the death of said Margaret P. Gallois, the amount of such unpaid outlays made by her on behalf of John Gallois still exceeds the then value of any claim against John Gallois, the whole of said fund shall go to and vest in the children of Jeanne G. Hill, after her death as hereinbefore provided, but said John Gallois shall not at any time be deemed indebted to said Trustee or to the estate of Margaret P. Gallois, nor shall any attempt be made by the Trustees or any successors of Margaret P. Gallois to collect any part of said outlays from said John Gallois, and if the same shall at the death of Margaret P. Gallois, apparently exist as an indebtedness, such indebtedness shall be deemed forgiven and cancelled, together with any instruments, documents or writings of any kind constituting evidence of any such indebtedness, so that the same cannot go to or vest in any successor of Margaret P. Gallois under the terms of this instrument or otherwise." (T. R. 93.)

It should be pointed out that under the Ninth Clause of the trust instrument John Gallois was under no obligation whatsoever to pay any money into the trust. Therefore, the payment of the balance of the $251,000 into the trust was a purchase of an interest in trust under Section 811 (c) and (i) of the Internal Revenue Code.

The Tax Court properly found as follows:

> "It should be noted at the outset that, since the trust was created prior to the joint resolution of March 3, 1931, the corpus (91) is not taxable solely because of the fact that the decedent reserved to herself the trust income during her life, *Hassett v. Welch,* 303 U. S. 303; *May v. Heiner,* 281 U. S. 238; *Estate of Edward E. Bradley,* 1 T. C. 518, and the respondent does not contend otherwise." (T. R. 98.)

It is well settled law that any suspension or forbearance of a legal right constitutes a sufficient consideration for a contract. In *Wells Fargo & Co. v. Enright,* 127 Cal. 669, 60 Pacific 439, 49 L. R. A. 647, it was held that a waiver of the right to plead the statute of limitations to an action to enforce the liability of a bank as a stockholder in a corporation was a sufficient consideration for the promise of a creditor of the corporation to forbear bringing suit for a period of six months, so that the statute was tolled by such an agreement. Certainly the payment by John Gallois of $251,000 in return for his mother's promise not to invade the principal of the trust and to appoint him trustee so that he could protect his interest in the trust property is sufficient considera-

tion for her promise not to invade the principal of the trust.

The California Civil Code defines consideration as follows:

> "*Section 1605.* Good Consideration, What. Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." (Enacted 1872.)

The gross value of the trust property at the time of the death of Margaret P. Gallois as shown by the deficiency letter of the Commissioner was $139,374.25 and the net value was $135,330.43. (T. R. 14.)

John E. Gallois paid to his mother and into the trust a total of $251,000 which he was not legally obligated to pay. The trust estate had no value at the time John E. Gallois made the repayment to his mother. (T. R. 96.) Section 811(i), Internal Revenue Code, provides as follows:

> "(i) Transfers for Insufficient Consideration. If any of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money and money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property other-

wise to be included on account of such transaction, over the value of the consideration received therefor by the decedent."

Considering that the trust estate had no value at the time John E. Gallois made the repayments to his mother and that the fair market value of the trust estate at the time of the death of Margaret P. Gallois was $111,000 less than the $251,000 paid by John E. Gallois when he was under no legal obligation to repay, it would seem clear that even if the trust was one which was includible in the Margaret P. Gallois estate under 811 I. R. C., there was no excess of the fair market value at the time of her death over the consideration paid by John E. Gallois to be included in the decedent's estate.

As we have pointed out above, an agreement to waive the statute of limitations is a sufficient consideration to support a promise given in return therefor. In other words, although a promise to do something which one is legally bound to perform is not consideration, the promise to do something which one is only *morally* bound to do is a sufficient consideration for a reciprocal promise. The rule in this regard is stated as follows:

"If he is only, under a moral obligation, as in case of the payment of or promise to pay a debt barred by the Statute of Limitations * * * he gives something he cannot legally be compelled to give, and there is a consideration for the promise given in return."

17 *Corp. Jur. Sec.,* Section 112, page 468.

II. PETITIONERS CONTEND THAT THE AGREEMENT BETWEEN THE DECEDENT, MARGARET P. GALLOIS, AND JOHN GALLOIS THAT JOHN GALLOIS WOULD PAY BACK THE SUM OF $251,000 ON AN OBLIGATION BARRED BY THE STATUTE OF LIMITATIONS ON THE CONDITION THAT HE BE MADE A TRUSTEE AND THAT THE CORPUS OF THE TRUST WOULD NOT BE INVADED MADE THE DOCTRINE OF THE CASE OF BLUNT v. KELLY, 131 FED. (2d) 632, INAPPLICABLE AND THAT THE VALUE OF THE TRUST CORPUS IS NOT INCLUDIBLE IN THE DECEDENT'S GROSS ESTATE UNDER SECTION 811 (c) AND (i) OF THE INTERNAL REVENUE CODE.

The Tax Court of the United States found the following facts concerning the oral agreement:

> "By October, 1928, John was financially able to pay the balance of the money he had borrowed from his mother. At that time he and the decedent agreed orally that he would pay back the sums he had borrowed upon condition that he was made a trustee and that the corpus of the trust would not be invaded again. She agreed to these conditions and John then executed his promissory note, dated October 30, 1928, in the sum of $251,000 to the trustees." (T. R. 94.)

> "Following this, and on November 7, 1928, two of the original trustees, Emile Pissis and William H. Cook, resigned, and John E. Gallois and Jeanne G. Hill were appointed trustees in their place. Following his appointment as trustee, John paid the balance of his indebtedness." (T. R. 95.)

From these facts the Tax Court reasoned as follows:

> "The only evidence of this agreement is found in the testimony of John Gallois. He testified that at the time he repaid his mother he insisted upon being made a trustee and on having his mother agree that the corpus would not be touched

again, since he felt that inasmuch as his mother had aided him, she might at a future date assist her daughter, who was then in straitened circumstances, or some other person. He stated that he realized that his sister's financial condition was growing worse and worse and that he wanted to have control of the trust in order to protect his sister and himself." (T. R. 99-100.)

"It does not appear from the above that the decedent and her son had more than an oral agreement that she would not again encumber the trust property in order to render financial assistance to her daughter, or some other person, as she had previously aided her son. Assuming full faith and effect be given to this agreement, there is nothing to show that the decedent relinquished the right to have the principal of the trust applied to her own use and benefit, if the necessity should arise, or that her son would object to such a use of the trust corpus. Moreover, there is no evidence as to the amount of the trust income or the financial status of the grantor. Nor is there evidence that the other trustee was ever informed of the agreement." (T. R. 100.)

"We are impressed by the fact that although the trust indenture was in writing, the petitioner is relying on an alleged oral amendment to vary its terms. The normal way to effect an amendment thereof would have been by a similar written instrument." (T. R. 100.)

"We are of the opinion that at the date of her death, the decedent, under the terms of the trust, had the right to have the trust principal applied for her support and maintenance and therefore the value of the trust is includible in her gross

estate as a transfer intended to take effect in possession or enjoyment at or after death." (T. R. 100-101.)

John Gallois testified as follows:

"A. Well, the other agreement was that I was to be a Trustee, and that she would not touch the principal of the trust, and I also knew that once that I was a Trustee, that she could not do that, because I could have stopped it, and I was perfectly protected, and as I say, having a quarter of a million dollars that my mother had handed out to me just on my word and on her word, I didn't think it was necessary between us to have anything. The only thing I did that was for the purpose, accounting purposes. I wanted to know that I was vested in $251,000, if I wanted to borrow on that, which I did later on, from Russell Miller. I figured I was vested in $251,000, and if I had not repaid the thing in full, or if there had been no record that I paid her in full, I would not have been vested in that." (T. R. 46.)

"Q. You state that you did continually borrow money on your interest?

A. I did.

Q. Did your mother know about that borrowing?

A. She agreed to it and signed it as a Trustee." (T. R. 47.)

It is clear from the evidence that the other trustees considered John Gallois had a vested interest in the trust property after this agreement. The minutes of the meeting of the trustees of the Margaret P. Gallois trust on October 28, 1929 shows clearly that all the

trustees considered John Gallois to have a vested interest in the trust after the oral agreement with his mother. It provided as follows:

Petitioners' Exhibit No. 3

(Copy)

"Meeting of the Board of Trustees of the Margaret P. Gallois Trust, held in the office of Platt Kent, Monday, October 28, 1929.

Present: Mrs. Margaret P. Gallois, Mrs. Jeanne Gallois Hill, Mr. John Gallois.

Mr. Platt Kent acted as Secretary.

It was unanimously resolved that a letter be addressed to Messrs. Russell, Miller & Co. authorizing this firm to call the trust funds which are at present on the call money market and directing them to issue a check in favor of the Trustees.

It was also unanimously agreed that for the time being the money obtained in closing out the account at Russell, Miller & Company shall be invested in a Certificate of Deposit pending further developments in the stock market.

The Trustees also agreed to honor an assignment made by Mr. John Gallois of his beneficial interest in the Trust in favor of Messrs. Russell, Miller & Company in an amount not exceeding $15,000. In the event Mr. John Gallois should become entitled to any disbursement from said Trust he will submit documentary evidence of the liquidation of his obligation with Russell Miller before this assignment will be considered null and void." (Tr. 85.)

"There being no further business to be transacted the meeting adjourned.

Secretary:

(Signed) Platt Kent

Approved:

(Signed) Margaret P. Gallois
(Signed) John Gallois
(Signed) Jeanne Gallois Hill (82)"

(T. R. 86.)

After John Gallois was made trustee he had full power to enforce his oral agreement with his mother, and her rights under the *Second* provision of the trust to invade the corpus were effectively waived. The California Civil Code, Section 2268, provides as follows:

> "*All must act.* Where there are several cotrustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides. (Enacted 1872.)"

There is no provision in the Gallois trust altering the effect of Civil Code Section 2268. Under Section 2268 of the Civil Code John E. Gallois as trustee had full power to enforce his oral agreement with his mother that she would not invade the principal of the trust, and any invasion would need his consent.

In *Clyde Van Fossen v. Joe Yager,* 65 C. A. (2d) 591, there was an oral agreement whereby two brothers went into possession of a ranch on condition that they would not deal with it so as to prevent inheritance by another brother. The oral agreement was

held enforceable in equity, although not in writing as the third brother had completely performed his obligation under the contract.

After the payment of the $251,000 John Gallois would have been granted specific performance of his oral agreement in this state.

In *Lucy Cardoza v. W. T. White,* 219 Cal. 474 the facts were as follows:

In 1924 Nunes owned real property in Merced County. He borrowed $2600 from the First National Bank to secure which loan he executed a deed to the land to Callaghan on September 27, 1924. He delivered this deed to Callaghan, stating that if anything should happen to him, the property was to go to his daughter, the plaintiff. On May 12, 1926, Nunes paid the indebtedness, and the daughter contributed the sum of $900 to said payment, and Nunes requested Callaghan to convey the property to her. Callaghan thereupon executed a deed to her.

The defendants, judgment creditors of the grantor, argued that the transaction could not be upheld as a trust because while the deed was in writing, the agreement constituting the trust was oral, and hence, violative of the statute of frauds. The Court denied this contention, saying:

> "But it is merely unenforceable when, in an action brought to compel performance of its terms, the party to be charged asserts its invalidity. Callaghan, the party obligated, did not refuse to recognize the trust. On the contrary,

> he carried out its terms. A creditor of the trustor has no right to challenge the voluntary completed performance by a trustee in such a situation. Indeed, if Callaghan had repudiated his obligation, plaintiff, as the intended beneficiary, could have held him as *constructive trustee* for her benefit. (See *Lauricella v. Lauricella,* 161 Cal. 61 (118 Pac. 430)."

Had litigation arisen between John Gallois and the decedent, the decedent's cause of action would have been based on the oral agreement between them.

In the case of *John L. McCormick v. Samuel A. Brown,* 36 Cal. 180, 1868, the Supreme Court held at page 184:

> "When the creditor sues, after the statute has run upon the original contract, his cause of action is not the original contract, for his action thereupon is barred, but it is the new promise."

This case has been followed many times by the courts of California. (See *Chabot v. Tucker,* 39 Cal. 434.) In *Elizabeth Heiser v. J. K. McAlpine,* 1937, 20 Cal. App. (2d) 467, the Court held that, in the case of a new promise made while the original obligation is legally enforceable, that if the new promise is not a general promise to pay the obligation according to its original terms, but is a promise coupled with any condition, and an action is brought after the statute of limitations would have barred the remedy in the original obligation, the action of the plaintiff must

then be upon the substituted, conditional promise and not upon the original obligation.

It is therefore clear that the decedent at the date of her death did not have the right to have the trust principal applied for her support and maintenance and that the decision of *Blunt v. Kelly,* 131 Fed. (2d) 632, is therefore inapplicable.

The testimony of Mr. Gallois with relation to his agreement with his mother, bearing on her waiver of right to resort to the corpus, if he would pay the outlawed obligation was as follows:

> " 'Mother, I am perfectly willing to do so, although I realize that I don't have to do it, with the understanding that you name me as a trustee, and also that we will never get into this mess again and *that we will never hit the principal* (T. R. 37) (or the corpus, if you want to call it that), and, so, to protect me I must be a trustee.' To which she agreed." (T. R. 38.)

From this testimony of Mr. Gallois, it is clear that both parties intended to retain intact the corpus of the trust providing Mr. Gallois would pay the outlawed obligation and it is plain from the testimony that Mr. Gallois had no intention of making such payment unless such an agreement on the part of his mother was made. Under such circumstances, it is not necessary that the agreement should have been incorporated in a writing.

> "A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the

obligations arising from it, so far as the facts are known or ought to be known to the person accepting."

Civil Code, Section 1589;

W. R. Campbell Company v. Herberts of L. A., 110 Cal. App. 244, at 247 et seq.

Mr. Gallois, in the above testimony, outlined the conditions under which he would make payment, the principal one being that no further resort should ever be made to the corpus of the trust. Mrs. Gallois understood the situation and according to the above testimony, agreed to the stipulations of her son.

Besides, a contract in writing may be altered by an executed oral agreement.

Civil Code, Section 1698.

In *Bard v. Kent,* 37 Cal. App. (2d) 160, the general rule is stated at page 163 as follows:

> "Any contract in writing may be altered by an executed oral agreement. (C. C. 1698.) The oral agreement of the deceased and defendant in 1929 providing for the COMMISSIONS on said lots A, B, and C, and for the conveyance to him of said Lots 3 and 4 were fully executed in every respect. It is binding upon them and their successors and the parole evidence rule is inapplicable."

In the present case, the oral agreement, above outlined, between Mr. Gallois and his mother, was fully executed by Mr. Gallois first by giving his note for the outlawed obligation and subsequently paying the balance of $251,000 to the trust. Mrs. Gallois performed

her part of the obligation by naming Mr. Gallois trustee of the trust. The oral agreement being fully executed barred Mrs. Gallois's right to invade the trust corpus and was a binding legal agreement on her part in this respect.

The testimony of Mr. Gallois with relation to the agreement is uncontradicted. In such case the rule is that uncontradicted testimony not inherently improbable or incredible in itself should not be disregarded by the Court but should be given its full force and effect.

> *Shepard v. Shepard,* 65 Cal. App. 310 at 313 and 314;
>
> *Stewart v. Silva,* 192 Cal. 405 at 411 (Concurring Opinion).

There is no legal basis to disregard Mr. Gallois's testimony

> "that we will never hit the principal * * * (or the corpus, if you want to call it that) * * * To which she agreed." (Tr. 37, 38.)

The testimony was uncontradicted, it is not inherently improbable or incredible and is fully consistent with the subsequent conduct of the parties. As is apparent from the findings, the Court did not disbelieve Mr. Gallois. Therefore, the Court should have given full effect to his testimony consistent with the intention of the parties. (T. R. 94.) Mrs. Gallois and the witness agreed that they would never "hit" or invade the corpus of the trust. This agreement would cover any capacity under which Mrs. Gallois could ask for

an invasion of the corpus, including her right as a beneficiary to such diversion of corpus under the terms of the trust. Under such circumstances, the corpus under the agreement was not a part of Mrs. Gallois's estate for estate tax purposes, both parties carried out their agreements implicitly.

CONCLUSION.

For the reasons above noted petitioners respectfully submit that the decision of the Tax Court of the United States that there is a deficiency for estate tax in the amount of $19,323.36 was erroneous and should be reversed.

Dated, San Francisco, California,
September 12, 1945.

Respectfully submitted,
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